



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

Software Protection

Intellectual Property Law

MVV59K Software Law
Mgr. Matěj Myška

Tento projekt je spolufinancován Evropským sociálním fondem a státním rozpočtem České republiky.



EVROPSKÁ UNIE



MINISTERSTVO ŠKOLSTVÍ,
MLÁDEŽE A TĚLOVÝCHOVY



OP Vzdělávání
pro konkurenceschopnost



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA

INVESTICE DO ROZVOJE VZDĚLÁVÁNÍ

2 | Mgr. Matěj Myška



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › Institute of Law and Technology
- › Assistant
- › Office hours:
Mon 10:00 – 11:30 a.m.
- › Contact:
 - › Room no. s61,
 - › Tel. 54949 4751
- › matej.myska@law.muni.cz

3 | Outline



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › Historical overview
 - › What form of IP protection?
- › IP Basics
- › Legal Framework
 - › Berne Convention, TRIPS, WIPO World Copyright Treaty
 - › European Software Directive (“EUSD”)
- › (Legal) Nature of Software & Future of IP Protection

4 | History I



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › 1960s – software as accessory
- › 1969 – Unbundling – IBM 360-series
- › 1970s and 1980s – the Great Debate
USA – Commission on New
Technological Uses of Copyrighted
Works (CONTU)
 - › Contract clauses
 - › Trade secret
 - › Patent Law
 - › Copyright Law

5 | History II



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › 1991 – EU Software Directive
- › 1996 – WIPO World Copyright Treaty
- › 2002 – Proposal for Directive on the protection by patents of computer-implemented inventions

6 | IP Basics



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

Copyright Law

- › Idea-Expression dichotomy
- › Sufficient level of creativity or originality (!)
- › Original works of authorship 70y

Patent Law

- › Defined by claims
- › new, non-obvious, and useful or industrially applicable implementation (innovative step) of ideas
- › 20y

7 | The Difference



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- Droit d'auteur
 - Civil Law
 - Author
- Copyright
 - Common law
 - Rightholder



› Berne Convention

› Art 2 - Definitions - literary works

› Art 9 - Right of Reproduction

› The Agreement on Trade-related Aspects of Intellectual Property Rights (“TRIPS”)

› Article 10 -

- *Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.*



- › WIPO World Copyright Treaty (Art 4)
 - › *...are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.*
- › Directive on the legal protection of computer programs (“EUSD”) 2009/24/EC



› Computer programs as literary works

11 | European Patent Convention



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › Art 52
- › The following in particular shall not be regarded as patentable inventions:
 - › *(c) schemes, rules and methods for performing mental acts, playing games or doing business, and **programs for computers;***



› Overview

- › **Art 1 Object of protection**
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › Art 4 Restricted acts
- › Art 5 Exceptions
- › Art 6 Decompilation
- › Art 7 Special measures of protection
- › Term of protection



› (1)

- › *In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as **literary works** within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.*
- › *For the purposes of this Directive, the term "computer programs" shall include their **preparatory design material**.*



› (2)

- › *Protection in accordance with this Directive shall apply to the **expression in any form of a computer program.***
- › *Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, **are not protected by copyright under this Directive.***



› (3)

- › *A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation.*
- › **No other criteria shall be applied to determine its eligibility for protection.**

16 | Originality



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › Eligibility criterion for copyright protection
- › skill, labour, and judgment doctrine (UK)
- › sweat of the brow (US)
 - › After *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991)
 - a program may not be a copy of another program, and it must be possible to demonstrate a minimum degree of creativity
- › Author's mark (France)
- › Kleine Münze (Germany)



› Overview

- › Art 1 Object of protection
- › **Art 2 Authorship**
- › **Art 3 Beneficiaries of protection**
- › Art 4 Restricted acts
- › Art 5 Exceptions
- › Art 6 Decompilation
- › Art 7 Special measures of protection
- › Term of protection



› Authorship

1. natural person, group of natural persons, legal person designated as the rightholder, collective works
2. group of natural persons jointly
3. employee – employer

› Beneficiaries



› Overview

- › Art 1 Object of protection
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › **Art 4 Restricted acts**
- › Art 5 Exceptions
- › Art 6 Decompilation
- › Art 7 Special measures of protection
- › Term of protection



- › (1) Exclusive acts (rights)
 - › Reproduction (a)
 - › Integrity (b)
 - › Distribution (c)

- › (2) First-sale doctrine
 - › Within EU only



› Overview

- › Art 1 Object of protection
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › Art 4 Restricted acts
- › **Art 5 Exceptions**
- › Art 6 Decompilation
- › Art 7 Special measures of protection
- › Term of protection



› Intended use

- › *In the absence of specific contractual provisions...(reproduction+alternation)...*
*shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the **lawful acquirer** in accordance with its **intended purpose**, including for error correction.*



› Back-up copies

› *The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.*

X

› EUCD Art 5 (2)(b)

› *made by a natural person for private use*



› Interpretation

- › *The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.*



› Overview

- › Art 1 Object of protection
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › Art 4 Restricted acts
- › Art 5 Exceptions
- › **Art 6 Decompilation**
- › Art 7 Special measures of protection
- › Term of protection



- › Decompilation
 - › Interoperability
 - › Only:
 - › Independent program
 - › Person having a right to use a copy of a program
 - › No necessary information available
 - › Gained result
 - › Any other purpose
 - › Three-step test
 - › in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program



› Overview

- › Art 1 Object of protection
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › Art 4 Restricted acts
- › Art 5 Exceptions
- › Art 6 Decompilation
- › **Art 7 Special measures of protection**
- › Term of protection



› Special measures of protection

› Infringing copies

› Technical protection measures (measures)

- Act of circumvention not illegal

- Any act of putting into circulation, or the possession for **commercial purposes** of, any means the **sole intended** purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.



› Overview

- › Art 1 Object of protection
- › Art 2 Authorship
- › Art 3 Beneficiaries of protection
- › Art 4 Restricted acts
- › Art 5 Exceptions
- › Art 6 Decompilation
- › Art 7 Special measures of protection
- › **Term of protection**

30 | Term of protection



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › WAS 50y
- › Council Directive **93/98/EEC**
harmonising the term of protection of
copyright and certain related rights
- › NOW **70y** post mortem auctoris
- › Justification X life-span
- › New versions? – derivative works

31 | The Big Questions



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

- › What to protect and how
 - › Literal copying of the source code
 - › Non-literal copying (?)
- › Pluralistic nature of software
 - › Textual
 - › Functional
- › Structure, sequence and organization



- › Regulatory approaches
 - › “*status quo*”
 - › “*make-it-fit*”
 - › “*sui generis*”
 - › “*clean state*”

According to: Watt, Richard. “Patent and/or copyright for software: what has been done so far?.”
Review Literature And Arts Of The Americas 4, no. 1 (2007): 3-14.



- *“Court finds World Programming Ltd. Infringed on SAS Copyrights”*
- *“World Programming secures High Court victory against SAS David slays Goliath as 30 year monopoly is ended.”*



MASARYKOVA UNIVERZITA
PRÁVNICKÁ FAKULTA
ÚSTAV PRÁVA A TECHNOLOGIÍ

Thank you for your attention!

matej.myska@law.muni.cz

Tento projekt je spolufinancován Evropským sociálním fondem a státním rozpočtem České republiky.



INVESTICE DO ROZVOJE VZDĚLÁVÁNÍ